Unto the Right Honourable, the Lords of Council and Session,

THE PETITION OF

Poor WILLIAM MACKAY, Journeyman Shoemaker in *Galston*;

Humbly ſheweth,

THAT *Charles Nicol* in *Galſton*, of this date, granted an heritable bond over the three ſhilling four-penny land of *Boghall*, for the ſum of 500 merks, in favours of the deceaſt *Hugh Morton* miller at *Tower-mill*.—That *Hugh Morton*, of this date, did, upon the foreſaid bond, obtain an adjudication of the ſaid lands of *Boghall*, for the accumulate ſum of 438 *l.* 6 *s.* 8 *d.* *Scots*. Nov. 16. 1677. Feb. 3. 1694.

That, of this date, *Morton* granted a diſpoſition of the premiſſes in favours of his daughter *Ann Morton*, in virtue of which ſhe appears to have been ſoon after infeft. Sept 24. 1695.

That *Ann Morton* married ——— *Smith*, who died ſoon after their marriage, leaving her with only one child, *Hugh Smith*, the preſent purſuer, who ſucceeding to his mother *Ann Morton* after her death, became undoubted proprietor of the lands of *Boghall* above mentioned.

That, of this date, in conſequence of an adequate price then paid, as appears from the narrative of the diſpoſition, the foreſaid *Hugh Smith*, ſon to *Ann Morton*, granted a full Mar. 16. 1742.

and

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and ample disposition of the whole premisses, in favours of the deceast *William Mackay* mason in *Galston*, the petitioner's father, with procuratory and precept, and with power to procure the said *Hugh Smith* entered in the subjects, as heir to his mother.

That on this disposition *Mackay* was base infeft of this date, and in *September* thereafter, he obtained from the Earl of *Marchmont*'s commissioners a precept of *clare constat*, in favours of his author *Hugh Smith*, as heir to his mother, upon which he was infeft; and of even date therewith, he also obtained a charter of confirmation in favours of himself, of the right he had purchased from the said *Hugh Smith*.

July 27. 1742.

Mackay's right being thus completed, he entered into possession of the whole subjects, and continued to act as absolute proprietor, without the least dispute till his death, which happened in *November* 1743, when he left the petitioner, his only child, an infant a few weeks old, without having made any settlement of his affairs, or named tutors for his son, who continued under his mother's protection.

In this situation did matters continue till the year 1763, when *Hugh Smith*, the same person who had disponed the lands of *Boghall* to the petitioner's father, thought proper to bring an action before your Lordships against the petitioner, in his own name, and likeways in the name of *Robert Smith*, as his factor, libelling, that in the year 1742, the lands of *Boghall* had been conveyed by the pursuer to the deceast *William Mackay*, the petitioner's father, but only in trust; and therefore concluding, that the petitioner ought to be decerned to make up titles in his person to said lands, and reconvey the same to the pursuer, and likeways to make payment of the rents of the lands, since the petitioner's father's entry thereto, and, in time coming, ay and while the pursuer should be reponed and retrocessed in the same, with expences.

The

The only evidence produced on the part of the purſuer to inſtruct this truſt, is a moſt inaccurate ſcrawl, ſcarcely legible, not holograph, and wrote on unſtamped paper, but ſigned by the petitioner's father, of this date, and in the Feb. 11. the following words:—" I *William Mackay* maſon in *Galſton*, 1743. " by theſe preſents, binds and obliges me to deliver up to " *Hugh Smith* wright in *Monkton*, all papers in my cuſtody " relating to the mailing of *Boghall*, belonging to him, and " that againſt *Whitſunday* next to come, he paying me what " expences I have been at in procuring his right to the ſaid " mailing before the Lords, and otherways. In teſtimony " whereof, I have ſubſcribed the ſame at *Monkton*, this e- " leventh day of *February*, One thouſand ſeven hundred " and forty three, before theſe witneſſes, *John Ralſton* wright " in *Monkton*, and *Robert Orr* ſchoolmaſter there, and wri- " ter hereof."—This obligation being objected to when pro- duced in this proceſs, as not being wrote on ſtamped pa- per, it was ſent to *London* in *December* 1763, and at that time had a ſtamp affixed to it.

This proceſs came in courſe before Lord *Alemoor* as Or- dinary, and being called in *December* 1763, *aviſandum* was made with it at deſire of the purſuer's advocate.

The petitioner thought he would have heard no more of this vexatious proceſs; but a ſummons of wakening having been raiſed, it was, of this date, again called before the June 27. Lord Ordinary, who, in abſence of the petitioner, decerned 1765. in terms of the libel.

A repreſentation was given in on the part of the petitio- ner, craving to be reponed againſt this decreet in abſence; which repreſentation the Lord Ordinary ordained to be an- ſwered, and, of this date, pronounced the following inter- July 25. locutor:—" Having conſidered this repreſentation, with the 1765. " anſwers thereto, and writs produced, finds the truſt li- " belled inſtructed by the obligation produced, and there- " fore ordains the defender to make up titles in his perſon

" to

" the ſubjects in queſtion, and to denude thereof in favours " of the purſuer, and decerns accordingly."

Againſt this interlocutor the petitioner repreſented; and the Lord Ordinary having appointed the repreſentation to
Feb. 13. 1766. be anſwered, of this date, pronounced an interlocutor in the following terms: " Having conſidered this repreſenta- " tion, with the anſwers made thereto, refuſes the deſire of " the repreſentation, and adheres to the former interlocu- " tor, finding the truſt libelled proven by the writs produ- " ced; but finds the repreſenter intitled to be reimburſed " of the expences deburſed by him, in terms of the back- " bond founded on, before he be obliged to reconvey the " ſubjects in queſtion to the purſuer; and ordains the re- " preſenter to give in an accompt thereof within ten days, " with certification."

The petitioner having given in a repreſentation againſt
March 10. 1766. this interlocutor, the Lord Ordinary, of this date, pronoun- ced the following judgment: " Having conſidered this re- " preſentation, refuſes the deſire thereof, ſuperſeding extract " till the 20th *June* next."

The petitioner muſt humbly beg leave to ſubmit theſe interlocutors to your Lordſhips review; and altho' the ſubject in diſpute is but ſmall, yet, as it is all the ſtock the petitioner has in the world, he hopes that circumſtance will plead his apology for laying his cauſe before your Lordſhips.

As the petitioner was not born at the date of the tranſaction in queſtion, as his father died a ſhort time after it was compleated, leaving the petitioner an infant only a few weeks old, without any tutor or proper perſon to look after his ſmall concerns, and as this purſuer was himſelf the perſon with whom the petitioner's father tranſacted this whole affair, it will appear to your Lordſhips, that the preſent parties in this action are very unequally matched, as the petitioner cannot know one circumſtance relative to this affair, but what he has learned from the common report of the

the country, and writs produced: And, on the other hand, this purſuer muſt know every circumſtance that in any degree concerns the matter in diſpute, as he was the perſon with whom the whole affair was tranſacted.

The petitioner ſhall now proceed to ſuggeſt to your Lordſhips ſome circumſtances, that, with ſubmiſſion, he apprehends renders it altogether improbable, that the diſpoſition granted by this purſuer to the petitioner's father was in truſt. In the *firſt* place, Your Lordſhips will not eaſily ſuppoſe, if this diſpoſition had really been in truſt, that this purſuer, who conſtantly reſided in the neighbourhood where the lands lye, would have held this obligation to rediſpone in his hands, and quietly looked on, and allowed the petitioner, or any perſon in his name, for more than 21 years, peaceably to poſſeſs lands which he muſt have known to be his property, if the diſpoſition had been really in truſt: And that the petitioner and his mother poſſeſt the lands for the ſpace above mentioned, without the leaſt interruption, will not be diſputed; for there never was any demand made upon this petitioner to denude himſelf of the right of theſe lands, till the month of *November* 1763, that this action was firſt called in court.

The purſuer indeed, in his anſwers to the firſt repreſentation given in for the petitioner, alledged, that an action had been brought before the ſheriff of *Ayr* ſhire, againſt this petitioner and his mother, for obliging him to denude of theſe lands, as early as the year 1744; but that action had no ſort of connection with this diſpoſition; it was ſimply an action brought by this purſuer againſt the petitioner and his mother, for payment of a bill that had been due by the petitioner's father, and to which this purſuer had acquired right: And that this is the fact with regard to the action in the 1744, is clearly inſtructed by an obligation of the purſuer's, produced in proceſs, obliging himſelf to deliver up the bill then founded on, which, it ſeems, at the

time of payment, he had not in his cuſtody; and the pur-
Anſwers, page 7. ſuer himſelf paſſes from this allegation in his anſwers to the petitioner's ſecond repreſentation.

The diſpoſition by this purſuer to the petitioner's father, is full and ample, without reſervation or reſtriction; it bears to be for an onerous cauſe; for after deſcribing the
Diſpoſition, p. 4. different ſubjects to be diſponed, it has theſe words: "*And* "*now for a certain ſum advanced and paid to me by* William "Mackay *maſon in* Galſton, *equivalent to the value of the* "*ſubjects after diſponed, whereof I hereby grant the receipt,* "*and therewith hold me well ſatisfied, renouncing all excep-* "*tions in the contrary for ever*, &c." And the fact is, that the diſpoſition was not granted in truſt, but in conſequence of an adequate price paid by the petitioner's father to this purſuer, at the date thereof, as the narrative of the diſpoſition bears. But, upon this purſuer's coming to the petitioner's father about a year after his having granted this diſpoſition, and making a clamour, that he had ſold the lands contained in this diſpoſition at too eaſy a rate; the petitioner's father, at that time, had ſo bad an opinion of the purchaſe he had made, that he offered to give the purſuer up his right, and put him again in poſſeſſion of the lands, upon his being reimburſed of the price he had paid, and expences incurred; and at that time it was, that the petitioner's father granted the inaccurate obligation now founded on by this purſuer; and that this was the fact, the
Page 2d, laſt repreſentation. petitioner, before the Lord Ordinary, offered to prove, if denied: But as no offer ever was made to reſtore the price, the obligation to rediſpone muſt of conſequence be void. And your Lordſhips will farther obſerve, that the date of the obligation founded on by this purſuer, is eleven months poſterior to the date of the diſpoſition, which could not poſſibly have been the caſe, had the diſpoſition been in truſt.

The

The reaſons aſſigned by this purſuer for his diſponing theſe lands in truſt to the petitioner's father, muſt appear not a little extraordinary to your Lordſhips; for he does not ſo much as pretend, that they were conveyed in ſecurity for a debt, for the behoof of creditors, or for any other probable reaſon whatever; he only alledges, that he conveyed them to the petitioner's father on purpoſe that he might make up titles to them, and after having done ſo, he was immediately to re-diſpone them to the purſuer.

But your Lordſhips will have obſerved, that this never could have been the caſe; for it was neceſſary, and the titles were accordingly firſt made up and compleated in the purſuer's perſon; to what purpoſe then was it for the petitioner's father to take a charter of confirmation and infeftment, if it was not in conſequence of the previous ſale to him? The diſponing to the purſuer would have been a very round about and ineffectual way to re-inveſt the purſuer in theſe ſubjects: It therefore appears, from the ſituation of the title deeds of theſe lands at the time they were diſponed to the petitioner's father, that the rights were compleated in the perſon of this purſuer himſelf, for a purpoſe very different from what he is now pleaſed to alledge.

The purſuer, altho' he hath not ſcrupled to aver, that this diſpoſition was obtained by fraud and circumvention on the part of the petitioner's father, has not been able to condeſcend on any one article that has the moſt diſtant appearance of fraud; nor indeed was it poſſible for him to do ſo with any degree of truth; for the whole of this tranſaction was fairly and honeſtly conducted. The petitioner's father was not a deſigning artful man, but a plain honeſt country maſon, unable to contrive or execute any deep laid deſign, either to the prejudice of his neighbour or advantage to himſelf.

Your

Feb. 13. 1766. Your Lordſhips will obſerve, that the Lord Ordinary, by his interlocutor of this date, finds the truſt libelled proven by the writs produced, and only finds the petitioner entitled to be reimburſed in the expences laid out by him, in terms of the back-bond founded on, before he be obliged to re-convey the ſubjects in queſtion to the purſuer; but his Lordſhip does not aſſoilzie the petitioner from the concluſion in the libel, as to repetition of rents.—Should your Lordſhips be of opinion, that the petitioner is obliged to re-convey theſe ſubjects to the purſuer, which he humbly hopes will not be the caſe; yet even in that event, he, with ſubmiſſion, cannot think that he will be found liable in repetition of the rents of theſe ſubjects, for the time that he, or his mother in his name poſſeſſed them *bona fide*, on a compleat feudal title that never had been challenged: For the petitioner, with ſubmiſſion, underſtands it to be a fixed and ſettled principle in the law of *Scotland*, that a *bona fide* poſſeſſor acquires right to the fruits of the ſubject he poſſeſſes, and that he is ſecure againſt any repetition of what he may have reaped during the time his *bona fides* continued; but it would be particularly hard to find this petitioner liable to repeat the rents, as he never ſince his majority, received a ſingle ſixpence from them, whatever his mother might have got before he was of age.

It has been ſaid by this purſuer, that the petitioner's intention in perſiſting in this action, was only with a view of continuing ſome time longer in poſſeſſion of the ſubjects: But this can have no weight with your Lordſhips, when you are informed, that the petitioner cannot at preſent touch a ſingle farthing of the rents, the purſuer having lock'd them up, by arreſtments on the depending action.

Upon the whole, the petitioner humbly ſubmits it to your Lordſhips, how far this moſt inaccurate and informal ſcrawl of an obligation founded on by this purſuer, not holograph of the petitioner's father, not wrote on ſtamped paper,

paper, and dated eleven months after the date of the diſpoſition to the lands, can by itſelf, without any other adminicle whatever to ſupport it, be held ſufficient to overturn a complete feudal title, backed with above 21 years uninterrupted poſſeſſion.

May it therefore pleaſe your Lordſhips, to alter the Lord Ordinary's interlocutors above complained of, and to find, that the diſpoſition granted by the purſuer to the petitioner's father, was not in truſt; and in conſequence, to aſſoilzie the petitioner from the preſent action; and at any rate, to find, that the petitioner cannot be liable to repeat the rents of the lands, during the time he, or his mother in his name, poſſeſſed the ſame bona fide: *And alſo, find him intitled to all ſums of money paid for the purchaſe, and the expences deburſed by his father, in completing the rights now under challenge, and what further expences the petitioner may yet be put to in re-diſponing the ſame, in caſe your Lordſhips ſhall find he ought ſo to do.*

According to juſtice, *&c.*

ALEX. ELPHINSTON.

paper, and dated eleven months after the date of the dispo-
sition to the lands can by itself, without any other adminis-
cle whatever to dispose of, be held sufficient to overturn a
complete feudal title, backed with above 25 years uninter-
rupted possession.

May it therefore please your Lordship, to alter the
Lord Ordinary's interlocutory decree complained of,
and to find, that the difficulties pretended by the pur-
suer to the petitioners disposition not to exist;
and to recommend, to assoilzie the petitioner from
the present action; and at any rate to find, that
the petitioner cannot be liable to repay the rents of
the lands, during the time he, or his author in his
name, possessed the same bona fide; and also, that
him entitled to all sums of money laid out for the par-
chase, and the expences debursed by his father, in
completing the rights now under challenge, and
subject further expence the petitioner may yet be
put to in re defending the same, as to your Lord-
ships shall seem meet so to do.

According to justice, &c.

ALEX. ELPHINSTON.